

***United States Court of Appeals
for the Second Circuit***



APPENDIX

*Original with affidavit
of Mailing*

76-1097

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1097

UNITED STATES OF AMERICA,

Appellee,

—against—

ROBERT DI GIOVANNI and
MICHAEL SADOWSKI,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*



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A 1

16 MR. DI CARLO: This is one of the problems
17 I raised in asking for a severance. Because at this
18 point I am now going to have to determine whether
19 or not this man was not-the person he identified
20 in the courtroom was not seen coming out of the
21 bank. There is testimony or there is documentary
22 evidence which was turned over to me that there
23 were three or four eye witnesses in the bank who
24 say that the third man in the bank was the one with
25 a mustache. And this is one of the problems that I

1 initially had in order to properly represent my
2 client. And I may be placing the codefendant in
3 jeopardy by my cross-examination of this witness.
4

5 MR. LOMBARDO: Well, that's the point I'd
6 like to make. I'd like to put something on the
7 record. I didn't want to interrupt Mr. Di Carlo
8 when he was making his opening statement to the
9 jury. But he admits that Sadowski had conversations
10 and had been in contact with my client, Robert
11 DiGiovanni, which I think is extremely prejudicial
12 at this point of the case.

13 Of course, if it develops that the reason I
14 didn't make the objection, your Honor, is that I
15 thought that in view of the expertise of my friend
16 here, that there would be testimony in the case
17 which would indicate some sort of conspiracy, and
18 then, of course, whatever statement was made by
19 Mr. Di Carlo would not be prejudicial. But certainly
20 at the initial stage of the case, to have such an
21 admission made -- and I don't fault Mr. Di Carlo.
22 He's representing his client. But I think this --

23 THE COURT: Well --

24 MR. LOMBARDO: And this later situation is
25 going to create a lot of problems for the prosecutor
as well as for the Court and defense counsel.

A 3

1 THE COURT: We are going to have overlapping
2 here. I can see that there is going to be over-
3 lapping. Whether or not the overlapping is of such
4 a prejudicial nature that there should be -- there
5 should have been a severance can only be determined
6 by the development of the facts in the case.
7

8 MR. DI CARLO: Your Honor --

9 THE COURT: At this point, I don't even--
10 though there is overlapping, whether or not there
11 might be some prejudice -- but that prejudice is
12 not of such -- I don't believe to be such an over-
13 bearing situation that the case cannot be tried.
14

15 (Continued on next page.)
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HS : m

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MR. DI CARLO: Your Honor, it is going to be replete with it. I stated that prior to trial I must give my opening, as I gave it, to present my case in that way. I stated at the beginning of this trial and before trial -- and the United States Attorney knows it -- from the nature of his evidence which was turned over to us that there must be conflict, severe conflict and prejudice. This is the opening wedge of it.

THE COURT: The prejudice that is involved, if we were discussing something other than this particular incident of the bank robbery involved, then I would have no qualms in agreeing with you that the prejudice is so overbearing that it outweighs the probative value.

MR. Di CARLO: It is the going into three other banks.

THE COURT: We are talking about this bank
at this time.

MR. DI CARLO: I'm going into three other banks in order to defend my client.

MR. BRINSTER: I think we could have a limiting instruction to the witness.

MR. Di CARLO: I do not want that. My client would be deprived of his rights.

1 Mr. Brewster knew this before we started
2 trial. On four different occasions I made this
3 application.

4 MR. BREWSTER: Perhaps Mr. Di Carlo could
5 explain how his client would be prejudiced?

6 MR. Di CARLO: Because I believe a full dis-
7 closure is necessary to protect my client's interests.
8 I need not go into the areas of my cross-examination--

9 THE COURT: By whom?

10 MR. Di CARLO: By myself or other defendants.
11 I stated that from the beginning, that it is pre-
12 judicial to my defendant and to every other defendant
13 in this case. I stated that on four occasions.

14 MR. BREWSTER: On four occasions? I really
15 do not mean to be facetious, but I am having diffi-
16 culty understanding the nature of the prejudice.

17 MR. Di CARLO: I will attempt to explain it
18 to you.

19 Your Honor, if this was a case being tried
20 with a single defendant, the Government could not
21 go into counts three, four, five, six, seven and
22 eight. Since he has joined the defendants, I must
23 go into counts three, four, five, six, seven and
24 eight. I think it would be highly prejudicial to
25 the defendant -- and I stated so -- I stated it on

A 6

1 four occasions, and if you want me to go into it more
2 deeply I will, but going into four bank robberies
3 will be more prejudicial than going into one --

4 MR. BREWSTER: It is equally clear or obvious
5 that Mr. Sadowski and Mr. Dougherty are only charged
6 in count one -- two.

7 THE COURT: Yes.

8 MR. BREWSTER: The only prejudice I can see
9 is a burden that Mr. DiGiovanni might bear --

10 MR. Di CARLO: And Mr. DiGiovanni's counsel
11 has raised that objection and joined in the objec-
12 tion in the beginning.

13 MR. LOMBARDO: I raise it again.

14 MR. Di CARLO: You are saying only one person
15 is getting an unfair trial?

16 MR. BREWSTER: Of course not. The question
17 is whether there is prejudice, and if there is, is
18 it unfair?

19 MR. Di CARLO: I do not think it is unfair
20 prejudice to have me go into three bank robberies
21 that you could not bring or I could not bring out --

22 MR. BREWSTER: I have no objection to any
23 defense lawyer going into the commission of a total
24 of four bank robberies by Michael Grafman. It
25 seems to me that that is an issue that goes to the

1 credibility of the witness Grafman, and you are en-
2 titled to bring that out --

3 MR. Di CARLO: I am entitled to bring out that
4 there was a team here and the team was the DiGiovanni
5 and Grafman. I am not limited to any unknown second
6 person.

7 THE COURT: B.t your man is charged with a
8 violation of count one and count two.

9 MR. Di CARLO: Yes.

10 THE COURT: That is the robbing of the National
11 Bank of North America on Kings Highway.

12 If you desire to bring in information as to
13 other bank robberies that someone else may have been
14 involved in, this Court can restrict --

15 MR. Di CARLO: Is your Honor stating at this
16 point that I will be precluded from going into the
17 conspiracy between Grafman and Di Giovanni?

18 THE COURT: If you are going into it without
19 showing that your client was part of the conspiracy.

20 If you are doing it to show your client was
21 part of it but didn't take part in any of the acts
22 of the conspiracy, I will restrict you.

23 MR. Di CARLO: It is important for the de-
24 fendant --

25 THE COURT: You cannot have it both ways.

1 If you say he was involved in four bank robberies,
2 then the jury will hear about it because you are
3 creating the prejudice. You cannot by your own means
4 create a prejudice and say "Look what is happening
5 to my client."

6 MR. Di CARLO: Your Honor has now answered
7 the point of why. I think this is important. In the
8 first instance when I was objecting to it as being
9 prejudicial, the question was asked "How does it
10 prejudice me?" I think I have achieved the first
11 point.

12 I would like this for the record: The first
13 point was that it is prejudicial to the defendant
14 DiGiovanni and the United States Attorney all but
15 admitted that. In order not to make it prejudicial
16 to the defendant DiGiovanni your Honor has indicated
17 that you are going to prejudice me on cross-examin-
18 ation--

19 THE COURT: Unless you are going to include
20 your man in that conspiracy.

21 MR. Di CARLO: Correct, your Honor.

22 THE COURT: I will preclude you. If you want
23 your man to be involved in four bank robberies here,
24 and you want to create the prejudice, it is all right.

25 MR. Di CARLO: The credibility of the witness

1 Grafman is at stake here.

2 THE COURT: He is not here yet.

3 MR. Di CARLO: He will be here.

4 THE COURT: When he gets here, I will cross
5 it then.

6 MR. Di CARLO: May I be heard? The credibility
7 of Grafman is essential. He is a liar. Liars some-
8 times tell the truth. There will be testimony coming
9 in as to DiGiovanni and other people which will affect
10 my client. I can show all the facts and circumstances
11 surrounding his lies without being limited. This
12 is not something that is a surprise. This is some-
13 thing that I have repeated again and again on four
14 different occasions. Your Honor has stated that I
15 will be precluded from a full examination and deprive
16 the jury of a full inquiry --

17 THE COURT: Let us see if I understand you:
18 You are saying that you are going to examine Grafman
19 as to the conspiracy with DiGiovanni?

20 MR. LOMBARDO: What about DiGiovanni, your
21 Honor?

22 THE COURT: I understand.

23 MR. LOMBARDO: What about my poor client?

24 THE COURT: Who said I am going to allow it?

25 MR. LOMBARDO: The jury will hear it.

1 THE COURT: No, they will not. L 10

2 MR. LOMBARDO: It is bad enough that we had
3 to stand trial as to two banks and now we will have
4 to stand trial as to four?

5 THE COURT: You cannot create a prejudice to
6 other defendants to get your defendant out.

7 MR. Di CARLO: You are saying that I am de-
8 liberately creating a prejudice. What I am seeking
9 to do is have a fair trial. It is the United States
10 attorney --

11 THE COURT: It is a fair trial for everyone.

12 MR. Di CARLO: It is the United States attorney
13 that has joined them in one indictment.

14 THE COURT: For one bank, not for four.

15 MR. Di CARLO: When a man gets up and testifies
16 before a grand jury as to four bank robberies, and
17 when he is lying as to four bank robberies and not
18 as to one, the United States attorney knew full well
19 this occurred.

20 My defendant cannot be deprived of a fair
21 trial, because the United States attorney has sought
22 and persisted in the face of the evidence to join
23 these defendants.

24 THE COURT: If you choose to bring your
25 defendant into three other bank robberies, that is

1 your decision. Your questioning of Mr. Grafman may
2 very well do that.

3 MR. Di CARLO: I will do that. I will question
4 him. I have no fear of that.

5 THE COURT: If it doesn't have anything to do
6 with your client, you cannot do that.

7 MR. Di CARLO: I have no fear of questioning
8 Mr. Grafman --

9 THE COURT: If you want to start developing
10 with whom, then there will be a problem.

11 MR. Di CARLO: There is a conversation with a
12 witness called Sonia.

13 THE COURT: Yes, she was in the last one.

14 MR. LOMBARDO: She was not.

15 THE COURT: She was mentioned.

16 MR. LOMBARDO: She was not a witness. I
17 went looking for her.

18 THE COURT: In the last one it was with respect
19 to the consent to search.

20 MR. Di CARLO: Sonia will be testifying to
21 conversations that occurred in connection with other
22 bank robberies. She is going to testify in connection
23 with bar robberies yet to come. I fully expect to
24 cross-examine Sonia on every detail of her statement,
25

1 not only as to this bank robbery, but as to other
2 robberies. The United States attorney knows
3 that.

4 THE COURT: We will cross all of those bridges
5 at the proper time.

6 MR. LOMBARD: Maybe we should have some sort
7 of modus operandi. I felt then and I feel now that
8 DiGiovanni was prejudiced unduly by having to stand
9 trial as to two separate bank robberies.

10 THE COURT: I know of no people who could
11 better secure one.

12 MR. BREWSTER: Your Honor, could we briefly
13 bring up the question of the stocking masks?

14 THE COURT: Let us first finish with this
15 question.

16 I just want it clear on the record what your
17 position is. I will state it and you will tell me
18 whether I am right or wrong.

19 It is your position that you wish to examine
20 Mr. Grafman in reference to other bank robberies which
21 you say your client was not involved in, right, to
22 show that the other persons were? That they had a
23 team or some kind of conspiracy going on?

24 MR. DI CARLO: Depending how the flow of the
25 testimony goes

1 THE COURT: Let me finish.

2 Depending on that to show why should your man,
3 Mr. Sadowski, all of a sudden become part of this
4 team? Is that what you want to show?

5 MR. Di CARLO: What I am going to show is
6 that Mr. Grafman has been consistent only in one
7 regard, that is the naming of DiGiovanni as his
8 accomplice in four bank robberies. In the other
9 bank robberies he shifted back and forth so many
10 times.

11 DiGiovanni was a long-time friend. The other
12 defendants, if I am not mistaken, he knew casually.
13 According to a statement from the United States
14 attorney, the relationship started on June 30th,
15 and the bank robbery occurred on July 2nd. He has
16 been consistent there, but he has lied with reference
17 to the drivers of the cars. He has lied on one
18 occasion and id dnot bring my defendant into the
19 bank robbery at all.

20 We then have Sonia coming in who is extremely
21 important --

22 THE COURT: There are two things wrong with
23 what you wish to do:

24 One, in order for you to bring a prejudice
25 upon another defendant on trial, it is necessary for

1 that defendant to have a right of cross-examination
2 of the party to bring that prejudice upon him.

3 Is Mr. Sadowski going to take the witness
4 stand?

5 MR. DI CARLO: I do not think I have to reach
6 that determination now.

7 THE COURT: You do not have to reach it now,
8 but in order for this Court to make a decision you
9 might have to.

10 MR. DI CARLO: I may make out my case through
11 the mouth of any witness on that stand.

12 THE COURT: Under those circumstances, I feel
13 I am absolutely right in preventing you from going
14 into that area.

15 MR. DI CARLO: Which area?

16 THE COURT: Showing that there was a conspiracy
17 by other defendants and why should your man all of a
18 sudden become part of it.

19 MR. DI CARLO: I am going into a multitude of
20 reasons.

21 Let us take the second claim: We have a woman
22 named Sonia. I assume since the 3500 material was
23 turned over to us, she will testify. I may want to
24 bring out in testing her credibility the bank robber-
25 ies as to DiGiovanni. If I do not mention the name

1 "DiGiovanni" --

2 THE COURT: That is a different problem.

3 MR. Di CARLO: That is the second --

4 THE COURT: That is not what we are talking
5 about now.

6 MR. Di CARLO: I am saying there are so many
7 facets to this. I cannot tell your Honor whether I
8 attempt to put my defendant on the stand, nor need
9 I. I do not have to circumscribe my examination
10 facing the question now whether I wish to place him
11 on the stand.

12 MR. BREWSTER: Your Honor, to state the Govern-
13 ment's position, we do not intend to put the other
14 three bank robberies into evidence into our case
15 against the defendant Robert DiGiovanni. If this
16 issue comes up, it will come up on cross-examination.

17 THE COURT: That is what I am saying.

18 MR. BREWSTER: As far as cross-examination
19 is concerned, the Court has the discretion under
20 Deton and Pappadakos and the other cases, to admit
21 that testimony concerning other bank robberies --

22 THE COURT: I understand that too. We are
23 not talking about the admissions. That is not the
24 problem we have before us now. The problem is the
25 admission of prejudicial matters as to the other

1 defendants, who will not have a right of confrontation
2 as to the witness being examined -- not the witness
3 on the stand, but a witness that should be examined
4 as to that.

5 MR. BREWSTER: From the Government's standpoint,
6 we have no objection to a limiting instruction to
7 Mr. Grafman for him to state simply that he partici-
8 pated in those robberies with other individuals, but
9 not bringing out who they were. That would be satis-
10 factory to the Government.

11 MR. Di CARLO: This is levity of the worst sort.
12 The Government knows that one of their witnesses will
13 be this Sonia, that her credibility will be at issue,
14 that she was a participant in a bank robbery, that
15 she was in with DiGiovanni at the time. Attacking
16 her credibility must bring DiGiovanni into it.

17 THE COURT: That is no problem for me.

18 MR. BREWSTER: I have let a number of things
19 that Mr. Di Carlo said go by, but it is not because
20 I agree with him. I know of no evidence of Sonia's
21 participation in a bank robbery. There is something
22 in the 3500 material relating to her, but nothing
23 as to her active participation in a bank robbery.

24 MR. Di CARLO: I believe you know of Section
25

1 MR. BREWSTER: Of course.

2 THE COURT: You know of aiding and abetting.

3 MR. BREWSTER: Yes.

4 MR. Di CARLO: I suggest that you read the
5 3500 material.

6 MR. BREWSTER: I have no objection --

7 MR. Di CARLO: I do not wish to go into the
8 case. I am just stating --

9 MR. BREWSTER: It is not something that I
10 accept.

11 MR. Di CARLO: I am stating it for the purposes
12 of my objection, that if I am circumscribed, Mr.
13 Sadowski cannot get a fair trial.

14 MR. LOMBARDO: If this evidence is permitted to
15 be elicited on cross-examination of the defendant
16 Grafman by Mr. Di Carlo, then Mr. DiGiovanni cannot
17 get a fair trial. I do not intend to bring anything
18 out as to that nature, and it isn't something which
19 the Government is bringing out on its own case, and
20 it is not something which the defendant DiGiovanni
21 is opening the door to.

22 THE COURT: That is the problem. I do not know
23 how that evidence can be brought in. You are not
24 allowed to open doors, because you are cross-examining.
25 You are limited to the proof as it is being submitted.

1 MR. DI CARLO: Your Honor, the proof that is
2 being submitted --

3 THE COURT: Yes, on direct examination.

4 MR. DI CARLO: I can elicit on cross-examina-
5 tion the credibility of a witness.

6 THE COURT: You can elicit on cross-examination
7 crimes committed by Mr. Grafman to attack his credi-
8 bility. Whether or not you can go into areas -- you
9 can go into areas involving Mr. Sadowski. I see nothing
10 wrong with that. But you cannot go into areas as to
11 these people. That is what I am talking about.

12 The more I think about it, the less problem
13 I see.

14 MR. LOMBARDO: May I suggest that your Honor
15 look into the reasons for the indictment --

16 THE COURT: That is not for this Court.

17 MR. DI CARLO: I heard your ruling and I
18 object strenuously. If your Honor adheres to that
19 ruling, I believe my defendant cannot receive a
20 fair trial in this case.

21 THE COURT: We will do our best for him to
22 receive a fair trial.

23 MR. DI CARLO: The Government was fully in-
24 formed of this --

25 THE COURT: We will do our best.

1 MR. DI CARLO: -- on four occasions as to
2 this factor. There is no surprise at all that we
3 have come to this impasse.

4 THE COURT: I do not see any surprises.

5 MR. BREWSTER: To simply state the Government's
6 position in a nutshell, the Government has no objec-
7 tion to Mr. Di Carlo bringing out the participation
8 of Michael Grafman in the three other bank robberies--

9 THE COURT: No question about it. He has the
10 right to do so.

11 MR. BREWSTER: -- and that participation was
12 with other individuals and not including Michael
13 Sadowski. The Government has no objection to that.

15 MR. BREWSTER: Your Honor, I'd like to inquire
16 of Mr. Lombardo whether I should instruct my witness
17 not to bring out portions of the conversation relating
18 to Robert Di Giovanni?

19 MR. LOMBARDO: Yes.

20 MR. DI CARLO: Unless directed specifically by
21 the Court, I will make those inquiries, and I note
22 for the record that if I am prevented from doing so,
23 that my defendant is being denied a fair trial by a
24 prejudicial joinder by the United States Attorney.

25 THE COURT: The Court will permit you to give

1 an offer of proof and the Court will determine whether
2 those questions would be proper on cross-examination
3 at the time.

9 MR. BREWSTER: I would just like to outline the
10 reference to Di Giovanni in one of these phone
11 conversations. If the witness were to describe the
12 entire conversation, he would point out that at the
13 end of the conversation Michael Sadowski said, "Well,
14 I am going to call Robert Di Giovanni and talk to him
15 about it."

16 Now, the Government is willing to handle this
17 any way agreeable to counsel. The witness could point
18 out that at the end of the conversation Sadowski
19 indicated that he wanted to call somebody else and
20 talk about the situation or the witness could be
21 instructed simply not to bring out that sentence in the
22 conversation and I am agreeable to any method.

23 MR. LOMBARDO: Speaking for the defendant
24 Di Giovanni, it is a rather awkward situation. It is
25 a situation that has arisen because of this joinder.

1 I wonder if it doesn't make a mockery of justice to
2 tailor a witness' testimony -- to trim the sales accord-
3 ing to the wind.

4 THE COURT: I think the entire situation is
5 improper. I do not know how anyone can tailor testi-
6 mony or exclude testimony, unless the Court makes a
7 ruling, and I will not make that ruling.

8 MR. LOMBARDO: Anything that has to do with
9 Di Giovanni, I will object to. The minute I object
10 to it, it is going to plant something in the minds
11 of the jurors that I am trying to hide something as
12 to my client.

13 THE COURT: That is the risk you take when you
14 make an objection.

15 MR. LOMBARDO: As I to allow improper testimony
16 to come in fear --

17 THE COURT: I have the utmost respect for your
18 ability. Whatever you want to do is strictly within
19 your prerogative. I can only make rulings, and I can
20 only make rulings when I have testimony coming from
21 a witness.

22 MR. DI CARLO: In view of that --

23 THE COURT: If it is part and parcel of a
24 whole conversation, that is one thing. I have no
25 right to dissect or to anything with that conversation.

1 I have no right to do that.

2 MR. BREWSTER: I think perhaps in view of the
3 Court's position, that I do not have any right to do
4 that either. I will ask the witness to describe the
5 entire situation.

6 THE COURT: As a prosecutor, I do not think I
7 would get involved in those semantics.

8 MR. BREWSTER: I won't.

9 THE COURT: I am not being a counselor or
10 advisor.

11 MR. BREWSTER: If Mr. Lombardo wants to object
12 at the time, he may.

13 MR. LOMBARDO: Isn't an offer of proof some-
14 thing that should be gone into and perhaps your Honor
15 would then be in a better position to make a deter-
16 mination?

17 THE COURT: Not as to this type of an offer of
18 proof. Not as to a conversation which was part and
19 parcel of the whole conversation. I do not think I
20 have a right to determine that.

21 (Continued on next page.)
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1 MR. LOMBARDO: We caught on the horns of a
2 dilemma --

3 THE COURT: As to prior similar acts, I would
4 take an offer of proof as to that. The Court would
5 have a right to go into that, but not as to testimony.

6 MR. LOMBARDO: I am sure that Mr. Brewster is
7 attempting to protect the rights of each of the defen-
8 dants. I am not raising any question about that.

9 Of course, your Honor is doing the same thing.

10 I am charged with a responsibility in an assigned
11 case to see that my defendant gets every right that
12 he's entitled to, and the most elementary and funda-
13 mental right is a fair trial. How is he going to get
14 a fair trial? This witness is going to take the
15 witness stand and, frankly, I am opposed to tailoring
16 any witness' testimony --

17 THE COURT: The only thing I could do with
18 your client, if your name is mentioned, is to give a
19 cautionary instruction that the fact that someone
20 named someone else does not tie him into the
21 conversation. If that is sufficient, I could do that.

22 MR. LOMBARDO: I would object to anything --

23 THE COURT: If you want to write out a
24 cautionary instruction, I will accept what you write
25 out.

1 MR. LOMBARDO: Your Honor does not need that
2 from me.

3 THE COURT: I will do it any way you wish.

4 MR. LOMBARDO: Your Honor always does it the
5 right way.

6 THE COURT: Not all the time.

7 MR. LOMBARDO: I am not concerned with leading
8 the Court into error --

9 THE COURT: I know you are not that type of an
10 attorney.

11 MR. LOMBARDO: I have had matters before your
12 Honor where your Honor might have been led into error
13 and I called for a side bar and alerted your Honor.

14 What we are going to have here is that we are
15 going to find ourselves in a position, Mr. DiCarlo and
16 myself, as bulldogs in a pit trying to protect our
17 clients. I do not think that any of the defendants
18 are going to get the better of it. They are entitled
19 to the benefit of any doubt, and I do not think there
20 will be any question in the minds of the jury after
21 Mr. DiCarlo and myself keep raising objection.

22 THE COURT: You're entitled to a fair trial,
23 but not to restrict evidence.

24 MR. LOMBARDO: Your Honor will recall a few
25 moments ago I refused to have Mr. Grafman's testimony

1 tailored. I do not think it is proper and I do not
2 think it should be done. That is something the
3 Government should keep in mind when it prepares a case.
4 We raised those questions many, many times.

5 MR. DI CARLO: Your Honor says he will not rule
6 at this time.

7 In view of what has happened, I again renew
8 my motion for the withdrawal of a juror on the
9 following grounds:

10 The question of tailored testimony. We are
11 going into the pit of battle between co-counsel. This
12 was something not foreseen by the Government. This
13 was something -- and I submit now that it may be
14 trial strategy -- but the Government had its right to
15 divide this case. It chose this method. We cannot
16 get a fair trial.

17 There is no question that if the evidence comes
18 in it is going to be prejudicial as to one of the
19 defendants. We cannot have a fair trial and I do not
20 know why the Government has persisted in this manner.
21 It will be obvious to all that a prior trial will not
22 be had in this matter.

23 The tailoring of testimony is not a thing that
24 you would desire or anyone would desire. I renew my
25 motion for the withdrawal of a juror and the declaration

1 of a mistrial.

2 MR. BREWSTER: A conflict of interest among
3 defendants is present in any case where you have more
4 than one defendant tried for participating in the
5 same crime.

6 THE COURT: That is true, but it is not true
7 where the statements of one will affect -- where the
8 statements by one involves another, and where the
9 statements of that person cannot in any way be
10 cross-examined.

11 At this time I do not know whether Mr. Sadowski
12 will take the witness stand, whether Mr. DiGiovanni
13 will take the witness stand, or whether Mr. Dougherty
14 will take the witness stand.

15 Where you have a situation -- even though it
16 may be primarily admissible -- where you do not have
17 the right of cross-examining that person as to
18 whether or not he made those statements and whether
19 the statements made were made in contemplation of
20 gaining some motive, that causes problems for the
21 Court. I am very concerned as you can see. I would
22 not even argue it with you if I were not. I would
23 not place on the record my attitude. I would just
24 merely sit here and let you object and then make my
25 ruling. However, I do see a problem. I do see the

1 problem of the failure of the defendant to examine
2 the person who presumably made the statement, and
3 not the third party, but the direct party. It is a
4 very serious problem. I think the Government should
5 maybe reassess the application. It is not that I
6 do not think it is not admissible, but whether or not
7 the Government wants to take a chance to determine
8 whether it can be a situation that would cause a
9 reversal on appeal? I do not know whether it is
10 worth it or not. I will not make that judgment.

11 MR. DI CARLO: I think there should be a
12 mistrial here.

13 Even if you feel that technically you are
14 within your legal bounds, and maybe you are right,
15 but I would submit that you as an assistant United
16 States Attorney would know that it is in your
17 interest that the defendants receive a fair trial.

18 THE COURT: I do not think Mr. Brewster forgets
19 that at all.

20 MR. DI CARLO: I am not saying that.

21 THE COURT: As he stands here he believes he
22 is doing the best thing for his case.

23 MR. DI CARLO: We do have problems in this
24 case. I think the longer the trial goes on the more
25 we recognize them. Perhaps it is better in the

1 interest of all parties, the Government included,
2 that this trial terminate now and we can get out
3 from under these questions that are coming in and
4 have a fair trial for the Government and for the
5 defendants. We have not invested five months' of
6 time or even three months. I think it would be a
7 great savings if we could divide this so we are not
8 jeopardized by the evidence now coming in, the failure
9 of the right of cross-examination as pointed out by
10 your Honor, and everything else in the case.

11 MR. BREUSTER: Your Honor, on the ultimate
12 question of whether the Government is willing to
13 assume this risk, the Government is willing to assume
14 it. I would like to make one other comment on the
15 question concerning the naming of Michael Sadowski
16 to the effect that he planned to call Robert
17 DiGiovanni and talk the situation over with him. I
18 believe that your Honor has great discretion to
19 redact any statement of this kind which causes a
20 problem. It is a little bit like redacting a Bruton
21 type statement.

22 THE COURT: Let me tell you what is wrong with
23 it:

24 There is no question that I could make the
25 admission. I could give the jury a cautionary

1 type instruction. But what is really wrong with it
2 is that if Mr. Sadowski is not called, then the
3 inference can be drawn from the statement by a third
4 party who:

5 (1) sits on this witness stand, a convicted
6 person who has pled guilty before the Court,

7 (2) a confirmed liar,

8 (3) that from that statement the inference
9 can be drawn that Mr. Sadowski did call Mr. DiGiovanni
10 and that Mr. DiGiovanni did discuss it with him,
11 without the jury having any benefit of cross-
12 examination as to whether that did in fact take place.

13 That is what is wrong with it. I see a serious
14 problem.

15 MR. BREWSTER: Your Honor --

16 THE COURT: The risk is very great.

17 MR. BREWSTER: -- I do feel that just as in
18 a confession, involving a Bruton problem, your Honor
19 does have the power to simply eliminate --

20 THE COURT: All I can do is give a cautionary
21 instruction.

22 The jury having human minds, as you and I, you
23 know they are going to sit in a corner and say, "He
24 said so, but why shouldn't we think about it?"

25 MR. LOMBARDO: Could we go one step farther?

1 Assuming that I wanted to call Mr. Sadowski
2 to deny these statements and he raises his Fifth
3 Amendment right, then where are we?

4 MR. DI CARLO: I would submit that your Honor
5 has discretion in this area, that it is not up to
6 counsel or the United States Attorney to make that
7 decision, that your Honor has expressed serious
8 problems, and now I appeal to your Honor's discretion,
9 in view of the statements made by your Honor as to
10 the serious problems involved, that you exercise that
11 discretion, and grant my motion with respect to the
12 removal of a juror and the declaration of a mistrial.

13 MR. LOMBARDI: I join in that motion.

14 MR. BREWSTER: If your Honor wishes, certainly.
15 it is within your Honor's discretion to simply require
16 the elimination of that testimony as to the reference
17 to Robert DiGiovanni in this conversation.

18 However, if your Honor does not choose to do
19 that, because of a concern with limiting the testimony
20 of a witness, I would point out that if your Honor
21 does not limit that testimony, I take great comfort in
22 the following fact:

23 That the Government will offer substantial
24 independent proof that Robert DiGiovanni did in fact
25 have a conversation with Michael Sadowski, unrelated

1 to the testimony that will be offered by this
2 witness in a few moments --

3 THE COURT: Through the same witness?

4 MR. BREWSTER: Through documentary evidence
5 and through the testimony of other witnesses.

6 MR. DI CARLO: Perhaps it might ease the
7 burden if I stated the theory of the defendant
8 Sadowski, that there were two people involved in a
9 robbery team. Those two people went around selecting
10 people in their crimes, they were involved in four
11 robberies together, and I know of no way that the
12 defendant Sadowski can get a fair trial if we are
13 precluded in the very theory of our defense. That
14 is what you have to do in order to protect
15 Mr. DiGiovanni -- I am not saying you, but that is
16 what has to be done to protect Mr. DiGiovanni.

17 MR. LOMBARDO: Redacting a written statement
18 is one thing, but redacting the testimony of a live
19 witness is another.

20 MR. DI CARLO: That is just the beginning of
21 it.

22 THE COURT: It is just a question at this point
23 as to whether or not any of the statements are
24 admissible on the basis of prejudice. We are right
25 back to where we started a half hour ago.

A 34

1 MR. DI CARLO: I can't make a stronger
2 statement as to how I intend to proceed. That is my
3 theory.

4 MR. LE MOLES: Mr. Dougherty is in a similar
5 position.

6 MR. BREWSTER: I will not limit the testimony
7 of the witness without instruction. I think it is
8 a great comfort that there will be substantial
9 independent proof that DiGiovanni had this conver-
10 sation -- enough proof to establish the existence
11 independently of the plan, plot, conspiracy to rob
12 other banks.

13 THE COURT: Before we cross that, do the other
14 defendants join in the withdrawal of a juror and the
15 declaration of a mistrial?

16 MR. LE MOLES: Yes.

17 MR. LOMBARDO: Yes, your Honor.

18 THE COURT: Very well.

19 MR. BREWSTER: The Government opposes that
20 notion.

21 THE COURT: The only consideration at this
22 time is whether or not the Court would permit that
23 and if it does that, what instructions I should give
24 and whether or not I should permit the statements to
25 come into evidence. I must determine that because

1 of the reamifications of the arguments ^{A 35} that have now
2 taken place.

3 I continue to see if this is not permitted,
4 that there will be other matters that will come up
5 and the same arguments are going to be made. It is
6 the nature of the case itself and the joinder of the
7 issues.

8 MR. BREWSTER: The issues are not different.

9 MR. LOMBARDO: In the first trial we had to
10 defend against two different crimes, two different
11 robberies, at two different times. I raised the
12 question at that time.

13 THE COURT: All of you give it some thought
14 and I will be out in ten minutes with my decision.

15 (Recess taken.)

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17 (continued next page)
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1 THE COURT: All right. The positions are all
2 the same?

3 MR. BREWSTER: Yes.

4 THE COURT: O.K. Then the Court has given
5 very, very considered thought to the problem that
6 faces it, and at this time denies the request made for
7 a mistrial made by all three defendants, particularly
8 that it would serve no useful purpose in that Mr.
9 Sadowski and Mr. DiGiovanni are joined in the
10 same indictment. And this Court feels that at this
11 time, since it's the same instance that they are
12 charged with, it would serve no purpose in the future
13 to try them together in a separate trial.

14 Mr. Dougherty is the one charged in a separate
15 indictment. Now though at this point he takes part
16 in the request for the mistrial it would serve no
17 useful purpose for a severance or a declaration of a
18 mistrial.

19 The Court still adheres to its original de-
20 cision that the -- of the admissibility of the evidence
21 that is requested by the Government and has de-
22 termined that it will attempt to give the jury
23 cautionary instructions as to the -- if and when such
24 testimony should be elicited.

25 That's the Court's ruling.

Q They were in your apartment 8:30 until 1 o'clock?

A Yes.

Q They started talking to you about the case at?

A 8:30.

Q Did you immediately come out and give them a statement?

A No, I didn't. I signed a paper for them to search the apartment.

Q What time did you give them the information that was contained in your statement?

A (No response.)

Q What time?

A I don't understand.

Q There came a time when they asked you to sign a statement, is that right?

A Yes.

Q About what time was that?

A I wouldn't know the time. It was a while after they arrested Bobby.

Q After you signed the statement, how much time elapsed between that time and 1 o'clock when you say you stopped talking?

A I didn't really talk, I just gave them my permission to search the apartment because Mr. Bratman was

1
2 interviewing me.

3 Q You gave permission?

4 A Yes.

5 Q What time was that about?

6 A I was there a quarter to nine, 9 o'clock, p.m.

7 Q At any time before that, did you talk to them
8 and did they ask you questions about the bank robbery?

9 A They asked me who Bobby Di Giovanni was.

10 Q Did they ask you anything else with respect to
11 who Bobby Di Giovanni was?

12 A Excuse me?

13 Q Did they ask you anything except who Bobby
14 Di Giovanni was, yes or no?

15 A I don't understand the question.

16 Q You say they asked you who Bobby Di Giovanni
17 was?

18 A Right.

19 Q Before they searched the apartment, is that
20 correct?

21 A Right.

22 Q Did they ask you anything else about bank
23 robberies before they searched the apartment?

24 A Yes, but I had to get dressed. I wasn't
25 dressed.

1 Q At the time -- withdrawn.

2
3 There came a time when the FBI came into the apartment,
4 is that correct?

5 A Right.

6 Q When they came in the apartment you were not
7 properly dressed?

8 No, I was dressed in a towel.

9 Q Did they give you time to go in and change?

10 A Yes.

11 Q They came in 8:30 and sometime later you came
12 out dressed?

13 A Yes.

14 Q Is that the time they started talking to you
15 about the case and asking you about who Bobby Di Giovanni was?

16 A True.

17 Q Would this be about 9 o'clock, is that correct?

18 A Bobby walked out of the apartment about 8:25 to
19 go out and meet his other friend Michael. I was in the
20 apartment drying my hair. I just stepped out of the shower.
21 And two minutes, when Bobby stepped out, someone knocked on
22 the door. I asked who it was. I thought it was Bobby. When
23 I peeked out the door, they pushed it on me and I went in back
24 of the door and I screamed and said don't come in. They were
25 telling me they were FBI agents and showing me their badges.

Q They came in?

A Yes.

Q Who came in at that time?

A I know Bruce Bratman did.

Q Anyone else?

A A policeman. I don't know if he was a Captain ---

Q Someone from the New York City Police Department?

A Yes.

Q Anybody else? Anyone other than Agent Bratman and --

A Quite a few agents.

Q Were you alone in the room with the agents and the Police Officer at that time?

A Yes.

Q You told them that you weren't dressed, you had a towel on and then you went to --

A I went into the bathroom and I put a robe on. I was nervous. And Mr. Bratman asked me who I was and if I had known anybody by the name of Robert Di Giovanni.

MR. LOMBARDO: I object to any conversations outside the presence of Mr. Di Giovanni.

THE COURT: Yes, any conversations not in his presence are not allowed.

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Q You had a conversation?

A He asked me --

Q All right. What happened next? Did he ask your permission to search your apartment?

A No, Robert was sitting on a lounge I had. I was sitting in the bedroom looking at him in handcuffs. I said, "That was Bobby."

He asked me if that was Robert Di Giovanni and I said, "No," I said, "That is Bobby."

He asked me to identify him and then he took him.

Q What time did they take him out?

A I would say 8:30.

Q 8:30?

A Yes.

Q You were already in your robe at 8:30?

A Yes.

Q After that, did they begin to examine you and question you, the FBI or the Police?

A What do you mean by examine me?

Q Ask you questions.

A Yes, they asked me if they were permitted to search the apartment. I said, "Yes, you may."

They asked me to sign a paper.

MR. LOMBARDO: I object to any conversations not

1 the page after the page marked 33, your Honor. I am not
2 sure what page your Honor has, "...You have heard some
3 testimony...." And so on.

4 THE COURT: Go ahead.

5 MR. LOMBARDO: I have no objection to what
6 follows the "first." However, I take strong exception
7 to "second: You may consider such evidence in evaluating
8 the defendant's identities, motives, intent, knowledge,
9 preparation of plans and carrying out the acts charged
10 in the indictment...."

11 I further except to the language, "You may not
12 consider evidence of further crimes as part of the bad
13 character of the defendant."

14 I think it implants something in the mind of the
15 jurors which is not in this case. The question of
16 character is not in the case. The defendants did not
17 offer any character testimony.

18 THE COURT: Do you want that all out?

19 MR. LOMBARDO: Well, yes, your Honor, in reference
20 to prior crimes which is exactly what this case --

21 THE COURT: There is evidence brought out by the
22 defendants' attorneys themselves.

23 MR. LOMBARDO: Not by this defendant's attorney,
24 your Honor.

25 THE COURT: We can't have it both ways. It is

either not in the case or it is in the case.

MR. LOMBARDO: I am on the horns of a dilemma.
This goes back to my original request at the beginning

THE COURT: I agree with you. You have been on the horns of a dilemma since the start of the trial. There is no question in my mind. But I still have to make rulings as I see them.

MR. LOMBARDO: Well, I certainly find no fault with your Honor making rulings. I trust you will permit me to --

THE COURT: Surely.

MR. LOMBARDO: -- to state my objections for the record.

THE COURT: I will let it stand.

MR. LOMBARDO: I think this is consistent with the position that the defendant Di Giovanni has taken from the beginning, that there should have been a severance as to him. And it would be impossible for him to get a fair trial under the circumstances. I can't argue with your Honor's charge on that particular point because of what you just said, namely, that the other defendants' attorneys did bring out proof of prior crimes. But I shouldn't be charged with it. I didn't bring it out.

MR. BREWSTER: Your Honor, I wonder about the

1 last sentence, the two sentences that follow the second
2 comma. It really states what Rule 404 provides. But
3 the last sentence troubles me.

4 THE COURT: We had a problem with it, likewise.
5 That is how it came out. That is exactly what took most
6 of the time.

7 What is your objection to it?

8 MR. BREWSTER: Well, Rule 404 says that the
9 other criminal acts can be taken into account in
10 evaluating the various factors that you mention, your
11 Honor, including motive and intent, and that sort of
12 thing, and that you can't consider such evidence on
13 the issue of character.

14 THE COURT: You can or you can't?

15 MR. BREWSTER: You cannot. Rule 404 says you
16 cannot. You can only consider it on intent, motive,
17 and that sort of thing. The last sentence troubles me
18 a little bit because it looks as if it's a cakeaway
19 from the sentence before.

20 THE COURT: "The law does not permit you to
21 conclude that someone is guilty of a crime...."

22 MR. BREWSTER: "solely because...."

23 THE COURT: Well, the word "solely" -- three
24 different words were used. One was "solely." One was
25 "merely." And the third "simply." But the force was

1
2 that I thought possibly I wouldn't use anyone of those
3 words and omit it. That someone is guilty of a crime
4 because he may have committed other acts at another
5 time rather than the word "solely."

6 MR. BREWSTER: I wonder if the sentence is
7 necessary or if the rule is not fully stated --

8 THE COURT: Well, we will take it out.
9

(continued next page)

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(The following continued to be heard in the absence of the jury.)

THE COURT: Well, we will take it out.

MR. LOMBARDO: No, I do not think it should be taken out. The jury should be told that you can't find a man guilty of robbing a bank on July 25th because he robbed one on July 2nd.

THE COURT: I thought about that. I gave it great thought before I had that put in the way it is.

MR. DI CARLO: The only other question is I would want the record to indicate that the only person accused of another crime was the defendant Di Giovanni. The United States Attorney has brought into this case the conspiracy to rob the bank on the 28th day of July. And I believe it cannot be used with these items mentioned. And therefore I also object to it.

MR. BREWSTER: Well, there is direct testimony by Grafman as to his conversations with Sadowski relating to that --

MR. DI CARLO: That is what I am objecting to. It is proof of another crime.

MR. BREWSTER: That is correct.

THE COURT: Do you object to it, Mr. Lombardo?

MR. LOMBARDO: To what, your Honor?

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THE COURT: That last sentence.

MR. LOMBARDO: No.

THE COURT: Are you objecting, Mr. LeMoles?

MR. LE MOLES: No.

THE COURT: You are objecting to it?

MR. BREWSTER: I will withdraw my objection if none of the defense attorneys has an objection, your Honor.

THE COURT: Well, one does have. Mr. Lombardo.

MR. BREWSTER: Does Mr. Lombardo have an objection to the last sentence?

MR. DI CARLO: I am referring to the proof of other crimes.

MR. BREWSTER: Mr. DiCarlo has no objection to the last sentence, your Honor. He has an objection just to the jury considering the telephone conversation.

MR. DI CARLO: As evidence of proof, intent, preparation, knowledge, or anything else.

THE COURT: I will let it stand just as it is. Much thought went into it.

MR. LOMBARDO: Exception, your Honor.

That is it, as far as I am concerned. Thank you, your Honor.

THE COURT: That includes now the requests.

All right, the charge has now been accepted by

1 all attorneys and the charge as written by the Court
2 will be delivered in that manner. There will be no
3 alterations or otherwise, with this exception, first of
4 all on page 47, and I think we have one No. 41.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 30th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the Government's Appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Joseph J. Lombardo, Esq.
16 Court Street
Brooklyn, N. Y. 11201

Donald E. Nawi, Esq.
2 Park Avenue
New York, N. Y. 10016

Sworn to before me this
30th day of August, 1976

W. S. Morgan
W. S. MORGAN
Notary Public, State of New York
No. 24-4501956
Qualified in Kings County
Commission Expires March 20, 1977

Lydia Fernandez
LYDIA FERNANDEZ